S.B. CIVIL WRIT PETITION NO.1422/2006
(Paras Ram Jalani Vs. Union of India & ors.)

Date of Order :: 31st October 2007

HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr.S.N.Trivedi)
Mr.Nitin Trivedi) for the petitioner

Mr.Jagdish Vyas)
Mr.Lalit Vyas) for the respondents

BY THE COURT:

Having heard learned counsel for the parties and having perused the material placed on record, this Court is clearly of opinion that the present petition in the second round of litigation on the same issue and same cause of action relating to the claim of the petitioner for promotion to the post of Junior Telecom Officer remains an exercise in futility; and the petitioner is not entitled for any relief.

The petitioner has averred that he was initially appointed on the post of Telephone Operator on 24.12.1966 and, upon his passing through the requisite test and training, was appointed on the post of Phone Inspector by the order dated 29.04.1975 (Annex.1); that he got an opportunity to appear in the departmental competitive examination in the month of August 1974 for the purpose of recruitment to the cadre of

Junior Engineer (subsequently re-designated as Junior Telecom Officer – 'JTO') under 15% quota and though he passed the said examination on 17.03.1975, could not be absorbed as Junior Engineer at the relevant time due to shortage of vacancies; that the Director General, Department of Telecommunication issued an order dated 24.08.1994 for filling up the posts of JTO from the candidates who had qualified the departmental competitive examination but could not be selected due to shortage of vacancies; that the petitioner made a representation on 07.02.1995 and requested for consideration of his case for promotion to the post of JTO; that ultimately his representation was accepted and the petitioner was detailed for requisite training under the letter dated 12.02.1999 (Annex.2); that thereafter, the petitioner was sent for training phase-I that he successfully completed as is evidenced by the letter dated 05.08.1999 (Annex.3); that thereafter, the petitioner was detailed for further training at Jabalpur for Phase-II under the letter dated 10.09.1999 that too was successfully completed by him; that the petitioner was appointed to the post of JTO w.e.f. 09.08.1999 by the order dated 07.10.1999 (Annex.4) but then he was reverted as Phone Inspector under a communication dated 24.12.1999 (Annex.5) stating that his candidature as JTO had been cancelled; and that, being aggrieved of his reversion by the

order dated 24.12.1999, the petitioner preferred an Original Application (OA No.405/1999) before the Central Administrative Tribunal, Jodhpur Bench, Jodhpur ('The Tribunal') that ultimately came to be dismissed by the order dated 05.09.2001 (Annex.6).

It shall be apposite at this juncture to take into comprehension the subject matter of the said OA filed by the petitioner that has a direct bearing on the present litigation. The Tribunal considered five OAs of the similar nature including the one filed by the petitioner. The applicants had earlier passed departmental competitive examination for the purpose of promotion under 15% quota to the post of JTO but could not be promoted due to paucity of vacancies. The petitioner had passed the said examination, as already noticed, in the year 1974. Upon the representation made by the petitioner and the like persons, the department issued a letter on 30.06.1995 with reference to a previous communication dated 24.08.1994 stating that it was decided to give relaxation for promotion of RS/PIs/AEAs/WOs in the cadre of JTO for the vacancies against direct recruitment quota as one time measure; and the persons who had qualified against 15% quota but could not be absorbed as JTO due to want of vacancies may also be absorbed against direct recruitment quota after diverting direct recruitment quota

vacancies to departmental competitive/qualifying quota; but, through a subsequent letter dated 25.07.1995, the said letter dated 30.06.1995 based on the Government of India letter dated 24.08.1994 was cancelled. However, without noticing cancellation letter dated 25.07.1995, on the representation received from the persons who had earlier passed the required departmental competitive examination for the purpose of promotion to the post of JTO and who were not appointed due to lack of vacancies, a letter dated 17.05.1999 came to be issued by the Assistant General Manager (Admn.) stating that the competent authority was pleased to give special chance to the persons who had not applied earlier to submit their representations in pursuance of the letters dated 24.08.1994 and 30.06.1995; and it was on the basis of the said communication dated 17.05.1999 that the orders were issued for allowing promotions to the persons (like the petitioner) to the post of JTO or for sending them for training. But, upon receiving subsequent information, the department came to know that it committed a mistake in issuing directions on 17.05.1999 on the basis of communications dated 24.08.1994 and 30.06.1995 without noticing that the same stood cancelled by the letter dated 25.07.1995. Accordingly, the department issued the communication on 02.12.1999 whereby the promotion/training of the petitioner and the other

persons to the post of JTO were cancelled. The said one and similar cancellation orders were in challenge in OAs before the Tribunal.

The Tribunal, after going through the entire history related with the matter upheld the submissions of the respondents that it were a matter of simple correction of mistake and not of any illegality. The Tribunal, inter alia, recorded significant findings and it is worthwhile to reproduce the entire of the findings as made while dismissing the OAs filed by the petitioner and the like employees. The Tribunal observed and found,-

> "8. From the above averment of the respondents, we are satisfied that the department has simply corrected the mistake, and it did not commit any illegality in issuing the impugned orders at Annexure A/1. Admittedly, the applicants passed the required departmental competitive examination in the years 1974, 1980,1982 and 1984 etc. by placing their names in the panel. But the appointment could not be given to them due to lack of vacancies. The necessary consequence would be that those panels would automatically lapse after the period of one year from the respective dates of the panels. It is only by virtue of letter dated 30.06.95, a Scheme was thought of to provide appointment/promotion to the post of JTO by according relaxation, but the said letter was cancelled within a period of one month on 25.07.95. If that is so, there is no law nor there is any scheme for appointment/promotion of the applicants on the post of JTO on the basis of the panels prepared in the years 1974, 1980, 1982 and 1984. When without noticing the cancellation letter dated 25.07.95, promotions were given on

> the basis of the cancelled letter dated 30.06.95, the department corrected it by cancelling those promotion orders issued under mistake. Therefore, in these circumstances, the department has not committed any illegality, and as such, the impugned order vide Annexure A/1 cancelling the illegal promotions, does not call for any interference. In this view of the matter, we do not find any merit in the contentions of the applicants that there is a discrimination or violation of Articles 14 and 16 of the Constitution. When the mistake was simply corrected, the applicants were not entitled to any notice, since their sending for training was issued without noticing the said letter dated 25.07.95. Even the applicants also made mis-representation for consideration of their case on the basis of the letter dated 30.06.95 and suppressing the said letter dated 25.07.95. In this view of the matter, we do not find any merit in the contentions of the applicants raised in these applications. Accordingly, we pass the order as under:-
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> "The Original Application Nos. 357/99, 405/99, 29/2000, 30/2000 and 211/2000 are hereby dismissed. But in the circumstances, without costs."
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> (underlining supplied for emphasis)

Aggrieved by the order aforesaid, the petitioner preferred a writ petition to this Court being D.B.Civil Writ Petition No.3670/2001 but then stated that he intended to move a review application to the Tribunal. The writ petition was, accordingly, decided by this Court on 21.09.2001 permitting the petitioner to move the review application with liberty to seek revival of the writ petition, if need be. The said review application moved to the Tribunal came to be rejected

on 28.09.2001 (Annex.7).

It is also relevant to notice that by way of the review application, the petitioner contended that no doubt the letter dated 30.06.1995 was cancelled by the order dated 25.07.1995 but the letter/circular dated 24.08.1994 was not cancelled and the petitioner and other seven persons were governed by the letter dated 24.08.1994 and not by the letter dated 30.06.1995 that alone was cancelled. It was contended that such point was urged before the Tribunal but was not considered while deciding the Original Application. The Tribunal pointed out that it was for the first time under the order dated 30.06.1995 that the concession provided under the letter dated 24.08.1994 was extended to 15% quota also and such concession was cancelled by the letter dated 25.07.1995. The Tribunal specifically held that the applicant's case was covered under the letter dated 25.07.1995 and by not the letter dated 24.08.1995; and held that the said letter dated 24.08.1994 did not apply to 15% quota; and even otherwise, as the applicant was sent for training in that 15% quota on the basis of letter dated 17.05.1999 only, his case would be covered by the circular dated 30.06.1995 which was cancelled by the circular dated 27.05.1995. The Tribunal held,-

> "The contention of the applicant that his case falls under letter dated 24.08.94, and therefore, the Tribunal could have considered his

> case under that circular dated 24.08.94 only, is untenable. It is only on the basis of his pleadings, we considered that his case falling under the 15% quota. Even the arguments addressed at the Bar also focussed on 15% quota only. Since the circular dated 24.08.94 does not apply to the 15% quota, we have not considered the same, since it did not apply to the case of the applicant. Moreover, vide Annexure A/A9 dated 17.05.99, also the benefit of circular dated 30.06.95 was extended only under 15% quota similar to the persons under the circular dated 24.08.94, the applicant and similarly situated persons were called for training on the basis of their passing in the departmental examination in the year 1974, 1980 and 1982 under 15% quota. Even this letter dated 17.05.99, specifically refers to the persons as against 15% quota only. The applicant also was sent for training in that 15% quota on the basis of Annexure A/9 dated 17.05.95 (annexed to OA), therefore, he cannot now say that his case was covered under the circular dated 24.08.94. Since the applicant belonged to 15% quota, his case was covered by the circular dated 30.06.95, which was cancelled vide circular dated 25.07.95."
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> (underlining supplied for emphasis)

The petitioner thereafter moved an application for revival of D.B.Civil Writ Petition No.3670/2001 in terms of the order dated 21.09.2001, however, the Division Bench of this Court endorsed the view taken by the Tribunal and finding no case for revival of writ petition rejected the prayer made by the petitioner. While affirming the reasons given by the Tribunal, the Hon'ble Division Bench observed in its order dated 28.11.2001 (Annex.8) that,-

> "This Misc. application has been moved to revive the D.B. Civil Writ Petition No.3670/2001, which had earlier been decided by us on 21st Sept., 2001 with liberty to revive, if need be. Thereafter, the petitioner moved a review petition before the CAT. The Central Administrative Tribunal has passed a detailed order giving reasons as to why the petitioner was not entitled to the benefit of the letter dated 24th August, 1994 in view of the fact that the letter dated 30.6.95 was cancelled vide letter dated 25.7.95. The Central Administrative Tribunal has passed an elaborate order giving reasons in support of it and we find that this order dated 28th of Sept., 2001, which has been passed by the CAT in the Review Petition No.13/2001, does not suffer from any error of fact or law.
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> We are in full agreement with the view taken by the CAT and the reasons given in support of the order. No case is made out for reviving the petition. Hence, this Misc. application is hereby rejected."

Thus ended the litigation taken up by the petitioner with the specific findings that even if his name was placed in the panel of the year 1974, the said panel would automatically lapse after the period of one year; that by virtue of letter dated 30.06.1995 a scheme was thought of providing promotion to the post of JTO by according relaxation but the same was cancelled within one month; that there was no law nor any scheme for appointment/promotion of the petitioner on the post of JTO on the basis of panel prepared in the year 1974; that the department has simply corrected the mistake and the petitioner was not entitled for any notice; that the petitioner's case was not covered under the circular dated 24.08.1994 but benefit for promotion was sought to be extended only on the

basis of the circular dated 30.06.1995 that stood cancelled by the circular dated 25.07.1995; and that the petitioner was not entitled for any relief towards his claim for being promoted to the post of JTO.

The petitioner has filed this writ petition on 24.02.2006 claiming essentially the relief, again, of consideration of his candidature for promotion to the post of JTO; and after narrating the facts relating to the previous litigation as noticed above, the petitioner has averred that in the similar circumstances, the relaxation order dated 24.08.1994 was complied with under the U.P.Telecom Circle and the candidates were absorbed as JTO under 15% quota; that the same controversy with regard to the promotion to the post of JTO under 15% quota in pursuance to the relaxation order dated 24.08.1994 was raised before the Central Administrative Tribunal in Uttar Pradesh wherein too, the Tribunal dismissed the application; but then, the Hon'ble Division Bench of Allahabad High Court, by its order dated 13.03.2003 (Annex.13) in D.B.Civil Writ Petition No.10135/2000: Shiv Singh & Ors Vs. U.O.I. & Ors. set aside the order passed by the Tribunal and so also the impugned order dated 25.07.1995 and directed absorption of the petitioners of the said writ petition as JTO with effect from the date on which similarly situated persons were promoted; and then, Special

Leave Petition No.9219/2003 submitted before the Hon'ble Apex Court was also disposed of on 24.11.2003 (Annex.14) declining to interfere with the judgment of the High Court. According to the petitioner, after the verdict of the Hon'ble Supreme Court, he made a representation on 06.09.2005 (Annex.5) and pointed out that the relaxation provided by the circular dated 24.08.1994 was still in force and the benefit thereof has been provided in the U.P.Telecom Circle and there was no reason for not providing the same benefit in the Rajasthan Telecom Circle lest it would be a case of hostile discrimination between the employees of two Telecom Circles and secondly, the cancellation order dated 25.07.1995 has been quashed by the Division Bench of Allahabad High Court and the order so passed by the Allahabad High Court has been affirmed by the Apex Court and hence, the cancellation order dated 25.07.1995 being not in existence, could not be made applicable to the petitioner. Thus claimed the petitioner benefit of promotion to the post of JTO. The representation so made by the petitioner was replied by the respondents on 06.01.2006 (Annex.16) stating that the Hon'ble Apex Court has passed the order confined to the candidates who had gone to the High Court; and the order passed by the Hon'ble Allahabad High Court cannot be treated as a general order for similarly placed persons.

Stating himself being aggrieved of such communication (Annex.16), the petitioner has stressed upon the contention in this writ petition that there cannot be any discrimination between similarly situated employees of Government of India; that for the U.P. Circle, the impugned letter dated 25.07.1995 stands quashed and set aside and, therefore, the effect of the said letter dated 25.07.1995 cannot be allowed to sustain in another circle i.e., Rajasthan. It has also been contended that the ratio of a judicial verdict when affirmed by the Hon'ble Apex Court, the same is liable to be made applicable throughout the territory of India and respondents have acted illegally in not doing so; that denial of promotion to the petitioner is for no good reason and results in depriving him of his livelihood; that there is no reason for not providing promotion to the petitioner on the post of JTO though he has passed departmental examination and has successfully completed training for 40 weeks.

On being questioned about competence of this writ petition particularly when reversion of the petitioner was ordered as back as in the year 1999 and the claim made by the petitioner for promotion to the post of JTO on the basis of such departmental examination and training had already been adjudicated upon and decided against him; and as to why the

fundamental principles of res judicata would not apply to the claim sought to made in this writ petition, learned counsel appearing for the petitioner submitted that the petitioner in earlier round of litigation did not challenge the order dated 25.07.1995; and the same having been adjudicated upon and quashed by the Hon'ble Allahabad High Court, the petitioner's reversion as made on its basis looses its ground and, for the claim so made by the petitioner being founded on different cause of action, this petition is not incompetent. Learned counsel has relied upon the decisions of the Hon'ble Supreme Court in Nand Kishore Vs. State of Punjab: (1995) 6 SCC 614 and Deva Ram and another Vs. Ishwar Chand and another: AIR 1996 SC 378. It has also been urged that the reversion of the petitioner was brought about in violation of principles of natural justice and then, his promotion was made on the basis of letter dated 24.08.1994 that still remains in force and there is no reason for which he could be denied promotion particularly when the law stands settled by the decision of the Allahabad High Court as affirmed by the Hon'ble Supreme Court. The submissions are not well founded.

As already noticed, so far the petitioner is concerned, the issue raised by him challenging his reversion order and claiming entitlement for promotion to the post of JTO had

already come to an end with final adjudication against him by the Tribunal with dismissal of his Original Application on 05.09.2001 and then, with rejection of his review application on 28.09.2001; and such adjudication met with its approval with this Court rejecting the revival application made by the petitioner on 28.11.2001. The findings against the petitioner as already reproduced and underlined for emphasis hereinbefore, stand concluded against the petitioner that the panel including his name prepared in the year 1974 lapsed after one year from the date of preparation of panel; that there was no claim for appointment/promotion of the petitioner to the post of JTO; that the scheme thought of under the letter dated 30.06.1995 was cancelled by the letter dated 25.07.2995 and the promotions accorded in ignorance of such cancellation were rightly withdrawn; that for such cancellation letter, the petitioner was not entitled for any notice; and that his case was not covered under the letter dated 24.08.1994 but under the letter dated 25.07.1995. Admittedly the said orders passed by the Tribunal and Division Bench of this Court were not challenged any further and attained finality with the findings aforesaid against the petitioner.

Now, the petitioner has attempted to resurrect his case with reference to the decision of the Hon'ble Allahabad High Court rendered on 13.03.2003. The attempt is bereft of

substance and an exercise in futility for the fundamental difference of the fact situation dealt with by the Hon'ble Allahabad High Court; and for the reasons of granting relief to the said writ petitioners; and, for the significant hold put by the Honble Apex Court on the operation of the order dated 13.03.2003. In the said case of Shiv Singh and others Vs. Union of India and others, writ petition was filed against the order passed by the Tribunal on 31.01.2000 and the petitioners also questioned the letters dated 25.07.1995 (the same one as referred hereinbefore) and the letter dated 03.08.1995. The court noticed the facts that the Union of India on 15.06.1990 made Rules for recruitment of JTOs providing two sources of recruitment namely, direct one with 65% quota and that of departmental promotion at 35% quota; that the promotion quota was further divided into the categories of 15% of departmental candidates through the competitive examinations, 10% by promotion of Transmission Assistants, Telephone Inspectors etc. through a competitive examination, and 10% by promotion from the said post on seniority cum fitness basis through a qualifying test and Rule 7 provided that Central Government could relax the provision for any class or category of persons; that by notification dated 27.08.1991 the departmental examinations were announced and the rules were relaxed for promotion quota making them

open to all who possessed three years Engineering Diploma with class 10th or 1st class B.Sc. with Physics and Mathematics; this relaxation was made for five years i.e., upto the year 1994; and with further relaxation, percentage of departmental quota was increased; the said petitioners and others appeared in the examination in which three candidates were declared successful against 15% quota and two candidates against 10% quota; that however, a representation was made for making one time relaxation in the rules to promote all those who had passed competitive examination but could not be promoted to the post of JTO as very few posts were available; the demand so made resulted in the letter dated 27.09.1994 whereby a further relaxation was made as one time measure and it was decided to divert all the available vacancies against direct recruitment quota to the departmental competitive promotion quota in order to absorb the persons who had qualified in the examination but could not be selected due to shortage of vacancies; and seventeen more candidates were declared successful who had appeared in the earlier examination, and by the letters dated 21.03.1995 and 24.03.1995 several persons were decided to be promoted. The case of the said petitioners was based on the ground of discrimination with the submissions that on 24.05.1995 result of 50 candidates including the petitioners

was declared and they were held successful; that by the letter dated 30.06.1995 issued by the General Manager Telecom, Lucknow a few employee were directed to receive training meant for promotion as JTO; however, in this list of 14 employees, the petitioners were not included though they were senior to the employees in the list in the sense that their examination was held earlier; and the respondent No.4 Chief General Manager, Telecom also issued similar letter for similar purpose on 10.07.1995. The respondents filed counter affidavits stating that the letter dated 30.06.1995 had been cancelled through two letters dated 25.07.1995 and 03.08.1995 and hence the applicants were not entitled to pre-promotional training and promotion to the post of JTO. The Tribunal dismissed the OAs holding that there was neither any exercise of power of relaxation nor the letters dated 24.08.1994 and 30.06.1995 were issued by the competent authority and that there was no discrimination. When the matter was challenged before the Hon'ble Allahabad High Court, it was specifically contended that on the basis of exercise of powers of relaxation as many as seventeen persons were promoted but other similarly situated persons were denied promotion and that was a case of discrimination; and it was urged that the petitioners were declared successful in the departmental competitive examination for promotion as

JTO on the basis of a valid exercise of powers of relaxation. It was also stated by the petitioners that similar relaxation and diversion of JTO vacancies from direct recruitment quota to departmental promotion quota was given by Bharat Sanchar Nigam Ltd. by its letter dated 29.08.2001. The respondents submitted that departmental promotion examination was conducted on 14.03.1992 for filling up 15% and 10% quota of vacancies to the post of JTO and the result was declared on 27.07.1993; that prior to 01.04.1995 the U.P. State had only one Telecom Circle but the position was changed thereafter with bifurcation into two separate Telecom circles namely, Eastern U.P. Circle and Western U.P. Circle with headquarters in Lucknow and Dehradun; that the district where the petitioners were posted were not under the control of Eastern Telecom Circle; the Department of Telecom, New Delhi realised that a wrong order was issued on 30.06.1995 allowing persons who qualified against the 15% quota (all group C cadre) to be absorbed against the direct recruitment quota after diverting the direct recruitment quota to the Departmental Competitive/Qualifying quota and thus by the letter dated 25.07.1995 all the Heads of Telephone Circles were informed that the said letter dated 30.06.1995 be treated as cancelled; and that all the petitioners were declared successful for the post of JTO on the basis of letter dated

25.04.1995 but the same was cancelled subsequently by the Chief General Manager of Eastern U.P. Telecom Circle through letter dated 03.08.1995.

Noteworthy it is that the Hon'ble Division Bench of Allahabad High Court, while observing that it was not necessary for them to go into all the submissions, proceeded to allow the writ petition only on the ground of discrimination, particularly after finding that relaxation was granted to seventeen candidates who had been declared successful in the second phase and with the observations that the petitioners whose result was declared in third phase were entitled to similar treatment. The findings of the Hon'ble High Court read thus:

> "It is not necessary for us to go into all the submissions made by the learned counsel for the petitioner as in our opinion the writ petition can be allowed on the very first point namely that there is discrimination against the petitioners. It is not disputed that seventeen candidates were promoted to the post of JTO after getting relaxation as stated in paragraph 10,14 and 22 of the writ petition. The Tribunal has held that relaxation was not granted by the Central Government in accordance with Rule 7, but undisputedly relaxation was granted to the aforesaid seventeen candidates who were declared successful in the second phase. The petitioners, whose results were declared in the third phase, were entitled to similar treatment but they were denied the same. Thus the view taken by the Tribunal appears to be arbitrary. On the one hand it has stated that the Central

Government has not granted any relaxation, on the other hand it has not accepted the plea of discrimination between the petitioners and the seventeen candidates similarly situate who have been promoted as JTO. The relevant discussion of the Tribunal's order on this point is in paragraph 16 of the writ petition where the Tribunal has only said that the appointments of the selected candidates is not under challenge.

It may be mentioned that the candidates who have been promoted as well as the petitioners both appeared in the March, 1992 examination and all of them were declared successful. However, only seventeen of these successful candidates have been promoted although their case is on the same footing as that of the petitioners. Thus there is violation of Article 14 of the Constitution.

In our opinion the view taken by the Tribunal that no relaxation was granted by the Central Government is not correct. In paragraph 13 of the Tribunal's order it is mentioned that the department of Tele Communication, Government of India granted the relaxation. However, the Tribunal was of the view that the decision of the department of Tele Communication, Ministry of Communication is not the decision of the Central Government. We cannot agree. The department of Tele Communication is only a limb of the Central Government and hence the decision of Department of Tele Communication has to be treated as the decision of the Central Government.

Thus there is clear discrimination against the petitioners. Hence we set aside the impugned order of the Tribunal dated 31.1.2000 and the impugned orders dated 25.7.95 and 3.8.95. We direct that the petitioners shall be promoted as JTO with effect from the date on which the seventeen similarly situate persons were promoted and they shall get all the consequential benefits.

The petition is allowed. No orders as to cost.”

A bare look at the decision of the Hon'ble Allahabad High Court makes it clear that case of the petitioners before the Hon'ble Court having been found resting on the same footings as that of the other seventeen persons who appeared in the examination held in the month of March, 1992 with the petitioners and were promoted, the Hon'ble Court considered it to be a case of discrimination that was not countenanced. From the said decision, it cannot be deduced that the order dated 25.07.1995 has as such been considered on merits and been ruled against. Moreover, if there was any likelihood of such argument being raised in any other matter that the order dated 25.07.1995 stands quashed altogether and for all purposes (as attempted to be carved out in the instant petition), the same stands effectively curtailed by the significant observations of the Hon'ble Apex Court in the Petition for Special Leave to Appeal filed against the said order dated 13.03.2003. Though the Hon'ble Apex Court declined to interfere with the order passed by the Allahabad High Court, but made it clear that the said order would remain confined to the writ petitioners who had appeared in the test held in the year 1993. The Hon'ble Supreme Court said,-

> "Delay condoned.
> Heard and also perused the record which has been brought by the learned Addl. Solicitor General in pursuance of our earlier order. While

> declining to interfere with the judgment of the High Court we observe that the order shall remain confined to the writ petitioners (respondents herein) who had appeared in the test held in 1993.
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> The special leave petition stands finally disposed of with the observations made above."
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> (emphasis supplied)

It is at once clear that the observations as made by the Allahabad High Court and the result of the said litigation cannot have a bearing on the case of the petitioner; and in any case, does not enure to his benefit. For basic difference of subject matter of dispute and the grounds for claiming relief; and then for specific observations made by the Hon'ble Supreme Court, the edifice whereupon the petitioner seeks to built his case falls to the ground.

Even if, for the sake of arguments, the said litigation is considered having any co-relation with the case of the petitioner, the fact remains that so far the petitioner is concerned, the matter was specifically agitated in the OA filed by the petitioner earlier and the matter specifically came to be decided conclusively against him and such decision was affirmed by the Division Bench of this Court. The fundamental principles of res judicata hit the petitioner fair and square.

The decisions relied upon by learned counsel for the petitioner have no bearing on the questions involved in this case nor are of any assistance for the petitioner. In the case of Deva Ram (supra), the plaintiffs filed a suit for recovery of sale price of the land in question on the ground that the said land was transferred to the defendants under promise to pay but they did not make payment and continued to remain in possession; the suit was contested on the ground, inter alia, that the defendants were tenants under the plaintiffs and were already in possession; and that the document relied upon by the plaintiff for recovery of sale price was obtained by fraud. An issue was framed on the question whether the defendants were in possession of the suit land as tenants under the plaintiff. The suit was dismissed by the trial court with the findings, inter alia, that the agreement was without consideration and so also with the finding that the defendants were tenants of the suit land. The judgment of the trial court was upheld in appeal with the finding that the land in question was at no stage sold by the plaintiff but the finding of the trial court on the issue regarding status of the defendant was reversed and it was held that the defendants had failed to prove themselves to be the tenants of the disputed land. The plaintiff then instituted new proceedings by filing suit for possession on the basis of title; and the subsequent suit was

resisted, inter alia, on the ground that it was barred by time as the defendants were in possession over the land in question since Svt. 2005 and had become owners by adverse possession. The Trial Court dismissed the suit but the Appellate Court reversed the findings of the trial court and the suit was decreed with the finding that the same was not barred by Order 2 Rule 2 CPC nor was it beyond time. Second appeal filed to the High Court of Himachal Pradesh was also dismissed and then the matter was before the Hon'ble Supreme Court. It was, inter alia, argued before the Hon'ble Supreme Court that the finding recorded by the trial court in the earlier suit holding the defendants as tenants be considered holding the field notwithstanding its reversal by the Appellate Court because the Appellate Court had ultimately decided the appeal in their favour. For the purpose of present writ petition, suffice is to notice in relation to the question of res judicata that the Hon'ble Supreme Court observed that though it was true that the subsequent suit was between the same parties who had litigated in the previous suit and the subject matter namely, the disputed land, was also the same but the issues and causes of action were different; and consequently the basic requirement for applicability of rule of res judicata was found wanting more particularly because the defendants did not plead in the later suit that they were

tenants of the land in question but pleaded only on adverse possession. The Hon'ble Supreme Court observed that in absence of issues and in absence of any finding, it was not open for the defendants to invoke rule of res judicata on the ground that in the earlier suit it was found by trial Court that they were the tenants of the land in dispute under the plaintiffs. Obviously the principles of res judicata are dependent on proof of certain basic facts and for the defendants failing to raise a plea, the same could not have been considered at all. The said decision has absolutely no relevance to the questions involved herein.

So far decision in Nand Kishore's case (supra) is concerned, the said decision essentially deals with the principles of constructive res judicata. The writ petition challenging the order of compulsory retirement without challenging the enabling provision was dismissed by the High Court; but in view of subsequent decision of the Hon'ble Supreme Court in another case, the same person filed a suit for declaration of the order of compulsory retirement to be invalid on the ground of it having been passed under an invalid provision and that the Supreme Court has held an identical provision to be unconstitutional. The question was as to whether the validity of the provision enabling the compulsory retirement could be deemed to have been questioned and

decided in the earlier writ petition. The Hon'ble Supreme Court ruled against the applicability of the principles of res judicata in relation to the subsequent litigation and held,-

> "19. It would then have to be seen the twin play of the notion of deemed constitutionally and bar of constructive res judicata. Raising the constitutionality of a provision of law, as it appears to us, stands on a different footing than raising a matter on a bare question of law, or mixed question of law and fact, or on fact. There is a presumption always in favour of constitutionality of the law. The onus is heavy on the person challenging it. It is by the discharge of onus that the presumption of constitutionality can be crossed over. When a person enters a court for relief and does not challenge the constitutionality of the law governing the matters directly and substantially in issue, it only means and implies that he goes by the presumption of constitutionality. He cannot on this stance be deemed to have raised the question of constitutionality and the question of constitutionality to have been decided against him and such matter to have been directly and substantially in issue. The constitutionality of the Rule relating to compulsory retirement cannot be deemed to have been questioned and decided against the appellant on the principles of "might and ought" or it being "directly and substantially in issue". It cannot be taken as a rule that one of the pleas, either by the plaintiff or the defendant, in every suit or proceeding, must of necessity relate to the constitutionality of the law on which the cause is founded or defended in order to obviate the plea of constructive res judicata being raised in an eventuality. It cannot also be taken as a rule that constitutionality of the law involved is a matter directly and substantially in issue, and if not raised renders a mute decision in favour of its constitutionality barring the plea being raised in a subsequent suit. If there be read such a rule in all civil litigation, it would, to our mind, be against public policy vexing and burdening the courts to go into the constitutionality of provisions of law in

> every case. When under the impugned Rule, the Government assumed to itself the power to compulsorily retire a permanent government servant after ten years of qualifying service, the court's act of striking that Rule as unconstitutional is the law which appeared on the scene, not only to break the presumption of constitutionality but to declare it void. In a sense the offending provision was never there and in the other it was henceforth not there. In either event, it would be within the ambit of the emphasised words in Mathura Prasad case.
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> 20. It thus seems to us that the view of the Full Bench of the High Court was erroneous on first principles. In the question referred to the Full Bench, no assumption could be made that a statutory Rule was valid when the court declined to issue a writ of mandamus, or its being treated as res judicata for the purpose of the subsequent suit. Mathura Prasad case did not merely stop at dealing with decisions relating to the jurisdiction of the Court trying the earlier proceeding, but had further gone to say that the principles of constructive res judicata would not apply when the law has since the earlier decision been altered by a competent authority. And in the context, this Court is a competent authority to alter the law when it declares it to be unconstitutional. Alteration does not limit alone to change therein but is inclusive of the power of striking down. Thus even if we were to decline the belated special leave petition of the appellant against the judgment and order of the High Court dated 5-2-1962 passed in Writ Application No.1061 of 1962, the appellant would be entitled to succeed in having the impugned order of the High Court upset in Civil Appeal No.632 of 1975, for the suit of the appellant could not, in any event, be held to be barred by principles of res judicata."

In the present case, the position is fundamentally different for the claim of the petitioner for promotion on the basis of circular dated 24.08.1994 has specifically and

categorically been declined by the Tribunal with dismissal of the earlier OA and the review application and the said decisions were affirmed as correct by this Court. That being the decision inter parties and having attained finality cannot be re-opened merely with reference to the decision made by the Allahabad High Court in relation to other employees who had appeared in the test held in the year 1993. There is no question of any constitutionality of any statutory provision that has been ruled upon by the Allahabad High Court and then, as already noticed, the Hon'ble Supreme Court has specifically confined the operation of the order made by the Allahabad High Court to the writ petitioners who had appeared in the test in the year 1993. The petitioner obviously does not fall in the class as referred by the Hon'ble Supreme Court.

The late attempt by the petitioner to resurrect his concluded matter with reference to the Allahabad High Court decision has rightly been declined by the Department and this Court is clearly of opinion that the claim of the petitioner stands effectively barred by principles of res judicata.

There is no force in this petition and the same is, therefore, dismissed. However, in the circumstances of the case, there shall be no order as to costs.

(DINESH MAHESHWARI),J.

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